STATE OF MICHIGAN

IN THE SUPREME COURT

BUDDY D. MILLER, II,

Plaintiff-Appellant,

v

CHAPMAN CONTRACTING, RAMZY KIZY, JR., KEVIN R. PAPERD, and SWEEPMASTER, INC.,

Defendants-Appellees.

UNPUBLISHED
February 16, 2006

No. 256676
Oakland Circuit Court
LC No. 03-053572-NI

130808
APPL
4/25
29309

PLAINTIFF - APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

NOTICE OF HEARING

CERTIFICATE OF SERVICE

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QUESTION PRESENTED FOR REVIEW

I. WHETHER THE COURTS BELOW ERRED IN CONCLUDING THAT PLAINTIFF'S PROPOSED AMENDMENT SOUGHT TO ADD A NEW PARTY RATHER THAN CORRECT A MISNOMER IN THE PLEADINGS.

STATEMENT OF ORDER APPEALED FROM AND RELIEF SOUGHT

Plaintiff-Appellant, WENDY TURNER LEWIS, bankruptcy trustee for the Estate of Buddy Dale Miller, II, debtor, seeks leave to appeal from the order of the Court of Appeals dated February 16, 2006, (see **Exhibit 1**) which affirmed the trial court's order granting of Defendants' Motion for Summary Disposition (see **Exhibit 2**). For the reasons set forth herein, this Court is urged to grant leave to appeal and upon full consideration of the merits of this case to clarify the current state of the law with regard to the misnomer exception to the relation back doctrine and ultimately hold that Plaintiff-Appellant's proposed amendment below did not seek the addition of a new party but rather to correct a misnomer in the pleadings.

GROUNDS FOR APPEAL

Appellant respectfully request that this Court grant leave to appeal because the decisions below is clearly erroneous and will cause material injustice. MCR 7.302(B) (5).

STATEMENT OF JURISDICTION

This Court has jurisdiction to consider this Application for Leave to Appeal pursuant to MCR 7.301(A)(2), this being an appeal from a decision by the Michigan Court of Appeals.

CONCISE STATEMENT OF PROCEDINGS AND FACTS

Bankruptcy debtor Buddy Miller, sustained serious personal injures in an automobile accident that occurred as a result of Defendants' negligence on December 28, 2000. On March 6, 2002, Mr. Miller filed a Petition for Bankruptcy under Chapter 7 of the United States Bankruptcy Code properly disclosing his personal injury action arising out of the December 28, 2000 motor vehicle accident as an unliquidated asset on his bankruptcy schedules. Plaintiff-Appellant Wendy Turner Lewis was appointed as the trustee of Mr. Miller's bankruptcy estate. Prior to the filing of the personal injury lawsuit, Ms. Lewis retained undersigned counsel and consented to his filing of this personal injury lawsuit (see affidavit attached as **Exhibit 3** and **Exhibit 4**). Plaintiff-Appellant's counsel mistakenly captioned the case in the name of the bankruptcy debtor Buddy Miller rather than in the name of Ms. Lewis, as bankruptcy trustee for the Estate of Buddy Dale Miller, II, debtor. Neither Mr. Miller nor Ms. Lewis had any input into the drafting of the Complaint and any errors in the drafting of the Complaint were strictly due to an error on the part of Plaintiff-Appellant's counsel (see affidavit attached as **Exhibit 4**).

Defendants-Appellees filed a motion for summary disposition pursuant to MCR 2.116(C)(5) claiming that Plaintiff-Appellant lacked standing to bring the lawsuit because the rights, title and interest regarding the December 28, 2000 motor vehicle accident were transferred to the bankruptcy trustee for the benefit of the bankruptcy estate and, therefore, the bankruptcy trustee, not Mr. Miller, was the proper party-in-interest.

The real plaintiff in this case is, and always has been, the bankruptcy trustee Ms. Lewis. Due to a misnomer, i.e. the failure to properly name Plaintiff, the pleadings simply failed to reflect this. Accordingly, in response to the motion for summary disposition, Plaintiff-Appellant filed a motion requesting the trial court to permit the bankruptcy trustee to amend her complaint

pursuant to MCR 2.118(D) to correct the mistake in the pleadings and to properly reflect her identity. She further argued that because the purpose of the amendment was to correct a misnomer, it should relate back to the original date of the filing of the complaint.

Defendants-Appellees responded that Plaintiff-Appellant's proposed amendment sought to add a new party after the expiration of the statute of limitation and was therefore futile. Defendants relied upon the Michigan Court of Appeals opinion in *Employers Mutual Casualty Company v. Petroleum Equipment, Inc.*, 190 Mich App 57; 475 NW2d 418 (1991) which held that generally the relation back doctrine is not applicable to the addition of new parties after the expiration of the statute of limitations. Defendants also cited *Hurt v. Michael's Food Center, Inc,*. 220 Mich App 169; 559 NW2d 660 (1996) in an effort to convince the trial court that it was constrained by Administrative Order No. 1996-4, codified in MCR 7.215(J)(1), to follow the holding in *Employers, supra.*[1]

The trial court entertained supplemental briefs from the parties which explored the exceptions to the general rule discussed in *Employers, supra.*, concerning the relation-back doctrine. Specifically, these supplemental briefs addressed the applicability of the misnomer exception to this case.

The trial court issued a written opinion and order on June 23, 2004 granting the Defendants-Appellees' motion for summary disposition and dismissed Plaintiff-Appellant's complaint (see **Exhibit 1**). The trial court set forth the following rationale as the basis for its decision:

> ...this is a motion to add a party and is not merely a request to correct a misnomer. Thus, this court finds that **based on the binding precedent in *Employers*,** the amendment would be futile

[1] MCR 7.215(J)(1) states as follows: "A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by special panel of the Court of Appeals as provided in this rule."

> as the addition of the new party cannot relate back to the original Complaint.

(See **Exhibit 1** at p. 4) (emphasis added).

Plaintiff timely appealed the order and opinion of the trial court to the Court of Appeals. On Feburary 16, 2006, in a per curiam, unpublished decision, the Court of Appeals affirmed the trial court's grant of summary disposition (see **Exhibit 2**). Specifically, the Court of Appeals concluded as follows:

> The relation-back doctrine does not apply to the addition of new parties. *Cowles v. Bank West*, 263 Mich App 213, 229; 687 NW2d 603 (2004); see also *Employers Mutual, supra* at 63.
>
> Plaintiff contends, nevertheless, that the requested amendment would do no more that correct a misnomer and that the *Employers Mutual* rule therefore does not bar the amendment and its relation back. "As a general rule,...a misnomer of a plaintiff or defendant is amendable unless the amendment is such as to effect an entire change of the parties.'" *Parke, Davis & Co v Grand Trunk Ry System,* 207 Mich 388, 391; 174 NW145 (1919) (citation omitted). The mismomer doctrine applies only to correct inconsequential deficiencies or techinicalities in the naming of the parties, for example, "'[w]here the right corporation has been sued by the wrong name, and service has been made upon the right party, although by a wrong name....'" *Wells v Detroit News, Inc*, 360 Mich 634, 641; 104 NW2d 767 (1960), *quoting Daly v Blair,* 183 Mich 351, 353; 150 NW134 (1914); *see also Detroit Independent Sprinkler Co v Plywood Products Corp,* 311 Mich 226, 232; 18 NW2d 387 (1945) (allowing an amendment to correct the designation of the named plaintiff from "corporation" to "partnership") and *Stever v Brown,* 119 Mich 196; 77 NW 704 (1899) (holding that an amendment to substitute the plaintiff's full names where their first and middle names had been reduced to initials in the original complaint would have been permissible).
>
> Where, as here, the plaintiff seeks to substitute or add a wholly new and different party to the proceedings, the misnomer doctrine is inapplicable. S*ee Voight Brewery Co. v. Pacifico,* 139 Mich 284, 286; 102 NW 739 (1905); *Rheaume v Vandenberg*, 232 Mich App 417, 423 n 2; 591 NW2d 331 (1998).

(See **Exhibit 2** at p. 3). It is from this order that Plaintiff-Appellant seeks leave to appeal.

STANDARD OF REVIEW

The grant or denial of a motion for summary disposition under MCR 2.116 (C)(5) is reviewed *de novo*. *Kuhn v. Secretary of State*, 228 Mich App 319; 570 NW2d 101 (1998).

ARGUMENT

I. THE LOWER COURTS ERRED BY CONCLUDING THAT PLAINTIFF-APPELLANT'S PROPOSED AMENDMENT SOUGHT TO ADD A NEW PARTY RATHER THAN CORRECT A MISNOMER.

The resolution of this case requires a determination of (1) the identity of the actual plaintiff, (2) whether a misnomer occurred, (3) the nature of the amendment sought and (4) whether there is any prejudice to Defendants. It is Plaintiff-Appellant's position that (1) the Plaintiff in this case is, and always was, the bankruptcy trustee Wendy Turner Lewis, (2) Plaintiff's counsel filed the complaint on behalf of the bankruptcy trustee but improperly named the Plaintiff, (3) Plaintiff-Appellant's proposed amendment did not seek to add a new party but rather to correct a misnomer and (4) there is no prejudice to Defendants.

MCR 2.118(A)(2) provides that leave to amend pleadings should be freely given when justice so requires. Leave to amend should be denied only for particularized reasons, such as undue delay, bad faith or dilatory motive on the movant's part, undue prejudice to the opposing party or where the amendment would be futile. *Ben Fyke & Sons v. Gunter*, 390 Mich 649; 213 NW2d 134 (1973). Pursuant to MCR 2.118(D), an amendment to a pleading relates back to the date of the original pleading if the claim asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading. Ordinarily, the relation-back doctrine does not extend to the addition of new parties. *Employers Mutual Casualty Code v. Petroleum Equipment, Inc.,* 190 Mich App 57; 475 NW2d 418 (1991). "However, where the amendment of pleadings is done merely to correct a prior error in naming

the proper party to the lawsuit, and the defendants have not been denied notice of the action due to this misnomer, the amendments do relate back to the date of the original pleading." *Miszewski v. Knauf Constr., Inc.*, 183 Mich App 312, 316; 454 NW2d 253, 255 (1990) (citations omitted). A "misnomer" is defined as "a mistake in naming a person, place or thing, esp. in a legal instrument." Black's Law Dictionary, Seventh Edition, West Group, 1999. The exception for misnomers applies to both the misnaming of plaintiffs and the misnaming of defendants. *Parke, Davis & Co. v. Grand Trunk R. System*, 207 Mich 388, 391; 174 NW 145, 146 (1919) ("'As a general rule, under the statutes, a misnomer of a plaintiff or defendant is amendable unless the amendment is such as to effect an entire change of parties.'")

This Court examined the misnomer exception to the relation-back doctrine in *Wells v. The Detroit News, Inc.*, 360 Mich 634; 104 NW2d 767 (1960). In *Wells*, the plaintiff originally named The Detroit News as a defendant in a lawsuit. Following the running of the statute of limitations, the plaintiff sought to amend its complaint to correct the name of the defendant to The Evening News Association which was a separate corporate entity that shared the same corporate address, corporate officers and registered agent. It was undisputed that the correct defendant, though improperly named, had received timely notice of the lawsuit.

In concluding that it had the power to grant an order correcting a misnomer of a party, this Court in *Wells* cited *Daly v. Blair*, 183 Mich 351; 150 NW 134 (1914); *Fildew v. Stockard*, 256 Mich 494; 239 NW 868 (1932); *Miller v. Bradway*, 299 Mich 574; 300 NW 889 (1941); *Detroit Independent Sprinkler Co. v. Plywood Products Corp.*, 311 Mich 226; 18 NW2d (1945). In each of these cases, this Court stated that a court has the power to correct a misnomer **which does not affect the substantial rights of the parties**. This exception for misnomers has been applied subsequent to the *Employers Mutual, supra.*, decision relied upon by both the trial court

and the Court of Appeals.

In *Vander Bossche v. Wilbur*, 203 Mich App 632; 513 NW2d 225 (1994), the Court of Appeals addressed the issue of misnomer in the context of a dramshop case. In that case, the plaintiff sued the liquor establishment under the wrong name. When the plaintiff later learned the correct corporate identity, it sought to amend the pleadings to correct the misnomer. In granting the amendment to correct the misnomer, the *Vander Bossche* Court stated that the case was similar to the one presented in *Wells v. The Detroit News, Inc.*, *supra.*

In contrast, in *Dejarnette v. American Building Maintenance*, unpublished opinion per curiam of the Court of Appeals, issued March 14, 1997 (Docket No. 191705) (attached as **Exhibit 5**), the plaintiff named the wrong corporate defendant in its lawsuit. The plaintiff later sought to amend the complaint to name a different corporate defendant. In upholding summary disposition for the defendant, the Court of Appeals determined that service on the first corporate defendant had not given constructive notice of the plaintiff's claim to the second corporate defendant. The Court of Appeals stated that nothing in the record suggested that the proper party was served in either its right name or its wrong name until after the expiration of the statutory period of limitations.

The principle relied upon by the Court of Appeals in reaching its decision in the *Dejarnette, supra.*, case was stated as follows:

> An amendment of pleadings under MCR 2.118(D) will generally not relate back to the original filing date for purposes of adding a new principal defendant. *Miszewski v Knauf Construction, Inc*, 183 Mich App 312, 316; 454 NW2d 253 (1983). However, where an amendment of pleadings is done merely to correct a prior error in naming the proper party to the lawsuit, **and the proper defendant has not been denied notice of the action due to this misnomer, the amendment relates back to the date of the original pleading**. *Id.* Thus, when the proper defendant has been served but the summons and complaint misname him, **the**

> **defendant will ordinarily be unable to show the type of prejudice necessary to prevent the amended complaint from relating back to the date on which the original complaint was filed**. *Wells v Detroit News, Inc*, 360 Mich 634, 641; 104 NW2d 767 (1960); *Vander Bossche v Valley Pub*, 203 Mich App 632, 642; 513 NW2d 225 (1994); *Miszewski, supra,* p 317.

Id. at 2-3.

Based on the above-line of cases, Plaintiff-Appellant submits that the misnomer exception is applicable to the present case. While most of the above-cited misnomer cases involved incorrectly named defendants, this Court has acknowledged that the principle applies to incorrectly named plaintiffs as well. For example, in *Daly v. Blair*, *supra.*, this Court stated that "in nearly all the cases cited the misnomer occurred with reference to the plaintiff. In the case of a misnomer of the plaintiff, the party proposed to be substituted is usually the petitioner, and therefore no question of service of process arises. But in the case of a misnomer of the defendant, the vital question always is whether the party proposed to be substituted has been served with process." 183 Mich 351, 353; 150 NW 134, 134 (1914).

The Court of Appeals below concluded, without any analysis whatsoever, that the amendment in this case sought to add a wholly new and different party to the proceedings. The Court of Appeals did not state how it reached this conclusion. Both the trial court and the Court of Appeals ignored the affidavits of Wendy Turner Lewis and Plaintiff-Appellant's counsel that the bankruptcy trustee was, and has always been, the plaintiff bringing this lawsuit against Defendant-Appellants. But for the incorrect naming of Plaintiff in the Complaint, the facts of the case are the same, the legal theories are the same and the defendants are the same. Defendants do not argue that they were not given timely notice of the claims asserted in Plaintiff-Appellant's Complaint. Nor do Defendants argue that they are prejudiced by the requested amendment.

Michigan jurisprudence embraces the concept that justice is best served by precluding the

avoidance of a valid claim by a legal technicality which does not prejudice the defendant provided that the plaintiff has acted in good faith. *Saltmarsh v. Burnard*, 151 Mich App 476, 491; 391 NW2d 382 (1986). Neither the bankruptcy debtor, Mr. Miller, nor the bankruptcy trustee, Ms. Lewis, acted in bad faith. Any negligence on the part of Plaintiff-Appellant's counsel in incorrectly identifying the named plaintiff should not be imputed to Plaintiff-Appellant nor should it preclude the applicability of the relation-back doctrine. *Id.* at 492-93.

CONCLUSION

Both the trial court and the Court of Appeals failed to recognize that the bankruptcy trustee is, and always was, the plaintiff who initiated the filing of this action. The failure to correctly identify the named Plaintiff was a misnomer. Because Plaintiff-Appellant's proposed amendment sought to correct this misnomer, rather than add a new party, it should have been permitted where Defendants had timely notice of the claims against them and would not be prejudiced by the amendment. Because Plaintiff-Appellant's proposed amendment sought to correct a misnomer, rather than add a new party, the relation-back doctrine applies.

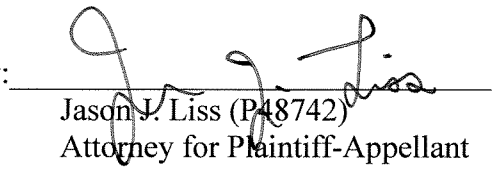
RELIEF REQUESTED

For the above-stated reasons, Plaintiff-Appellant respectfully requests that this Court grant leave to appeal and reverse the judgments of the Oakland County Circuit Court and the Court of Appeals and order that (1) Plaintiff-Appellant is entitled amend the Complaint to correctly identify the named plaintiff as WENDY TURNER LEWIS, bankruptcy trustee for the Estate of Buddy Dale Miller, II, debtor and (2) reverse the granting and affirmance of

Defendants-Appellee's motion for summary disposition.

Respectfully submitted,

ROCKIND & LISS, PLLC

By: 

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Dated: March 27, 2006

Addendum I

Index of Exhibits